

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE WEAVER,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251890
Wayne Circuit Court
LC No. 03-004606-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). We affirm.

Defendant first argues that the victim's statement to her mother that defendant had sexually assaulted her was improperly admitted as an excited utterance. MRE 803(2). MRE 803(2) provides that excited utterances are not excluded by the hearsay rule, even though the declarant is available as a witness. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). For a hearsay statement to be admitted into evidence as an excited utterance, the statement must have been made while under the excitement caused by a startling event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

The victim's mother testified that after repeated questioning of her daughter, the victim began crying and stated that defendant did "everything" to her. Defendant argues that the statement was not made immediately after the incident and, therefore, should not have been admitted by the court under MRE 803(2). We agree. The statement was made months after the assault, under repeated questioning by the victim's mother. While the evidence supports the conclusion that the victim was under "the stress of excitement" when the statement was made, it appears that the stress of the moment was induced by the circumstances of the questioning rather than the sexual assault itself. See *People v Straight*, 430 Mich 418, 426; 424 NW2d 257 (1988).

However, we conclude that admission of this evidence was harmless. Harmless error "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The victim testified in detail that defendant had sexually assaulted her on a number of occasions. In

addition, the doctor who examined the victim in the hospital testified that the victim told him that defendant had intercourse with her. See MRE 803(4). The doctor also testified that a tear in the victim's hymen was consistent with sexual intercourse. Also, defendant's girlfriend testified that defendant told her of his desire to masturbate on the victim. In light of the weight of this evidence, the admission of the victim's statement to her mother was harmless. *Mateo, supra*.

Defendant next argues that he was denied a fair trial when the prosecutor elicited testimony that defendant had molested another girl. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The record establishes that the prosecutor never elicited testimony that defendant molested another girl. Rather, the challenged testimony merely relayed that after speaking with her own daughter, the witness in issue had concern for the victim. In context, this does not necessarily imply that the concern stemmed from allegations of abuse involving anyone other than the victim in the case at hand. In any event, the court immediately struck the challenged answer and instructed the jury to disregard it. Further, in its charge to the jury at the close of proofs, the court instructed as follows: "Now, during this trial I had . . . stricken testimony that was heard. Do not consider those things in deciding this case." Juries are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Accordingly, we conclude that defendant has failed to establish plain error affecting substantial rights.

Finally, defendant argues that the trial court improperly limited his cross-examination of the victim's mother and of defendant's former girlfriend, and erroneously denied his motion to introduce testimony regarding the victim's alleged sexual history. We see no error in the court's handling of these matters. A trial judge has a great deal of discretion in limiting cross-examination and such discretion is not subject to review unless a clear abuse of discretion is shown. MRE 611; *People v DeLeon*, 103 Mich App 225, 233; 303 NW2d 447 (1981).

Defendant was afforded the opportunity to question both the victim's mother and the former girlfriend about his theory that they had made up the story about the later calling the former with information about defendant's abuse of the victim. Defendant had to accept the denials given by the former girlfriend, given the collateral nature of the inquiry. *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002). Further, the court's limitation of defendant's attempt to repeatedly question the victim's mother about the matter or to raise it again during direct examination of a third witness was not improper. MRE 611(a); *People v McDunnah*, 21 Mich App 116, 117; 174 NW2d 859 (1970) ("Limitation of repetitive questioning is not an improper restriction of cross-examination.").

We also reject the assertion that the court erred in denying defendant the opportunity to present hearsay testimony regarding the victim's alleged sexual behavior.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens